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Supreme Court, U.S.
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No. 92-938

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

MAURICE RIVERS

AND

ROBERT C. DAVISON,

Petitioners,

V.

ROADWAY EXPRESS, INC.

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

MEMORANDUM OF RESPONDENT IN OPPOSITION TO MOTION FOR JOINT CONSIDERATION

*John T. Landwehr
Thomas J. Gibney
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43604
Telephone: (419) 241-6000
Telecopier: (419) 247-1777

Attorneys for Respondent

*Counsel of Record

Petitioners, Maurice Rivers and Robert C. Davison, ("Petitioners") have moved the Court to jointly consider their petition with the petitions filed in: (1) Baker v. Gulf & Western Industries, 961 F. 2d 222 (11th Cir. 1992), cert. denied, 61 U.S.L.W. 3477 (1993); (2) Johnson v. Uncle Ben's, Inc., 965 F. 2d 1363 (5th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3356 (September 29, 1992) (No. 92-737); (3) Landgraf v. USI Film Products, 968 F. 2d 427 (5th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3371 (October 28, 1992) (No. 92-757); and (4) Kuhn v. Island Creek Coal Co., 1992 U.S. App. LEXIS 20996 (6th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3383 (November 3, 1992) (No. 92-787). Respondent, Roadway Express, Inc., ("Roadway")[1] received Petitioners' motion on January 12, 1993. Pursuant to Rule 21.4, Roadway's response is due on or before January 22, 1993, and this memorandum is timely submitted in accordance with that rule.

Petitioners proffer six (6) reasons why this Court should jointly consider this case with the above-noted cases; all six (6) are easily dismissed.

First, Petitioners state that by their calculation Roadway's brief in opposition to their petition was due January 5, 1993. (Motion at 1.) Roadway's brief was filed on January 5, 1993. This case is ready for the Court's consideration pursuant to Rule 15.5 and the Court should not delay consideration to consider Petitioners' tardy procedural motion.

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[1] Roadway's Rule 29.1 list was previously filed. (Brief of Respondent in Opposition to Petition for Writ of Certiorari at ii.) No amendment is necessary.

Second, Petitioners allege that the applicability of the Civil Rights Act of 1991 ("1991 Act") to pending cases is an important issue. (Motion at 1.) While that may be true, the applicability of the 1991 Act is not a material factor in determining the entitlements of the parties in this particular case. (See Brief of Respondent in Opposition to Petition for Writ of Certiorari at 8-10.) Because Petitioners have not and cannot show how the applicability of the 1991 Act would enhance their prospects for success on remand, the importance of the applicability of the 1991 Act to pending cases is not an issue this case has in common with the other cases cited in their motion.

Petitioners' third through sixth points all concern the alleged pendency of the previously noted cases and an alleged conflict between those cases and the Ninth Circuit's decision in Davis v. San Francisco, 976 F. 2d 1536 (9th Cir. 1992). (Motion at 1-3.) Some of the information Petitioners offer is outdated. Other claims Petitioners make are simply wrong.

The Court has already denied certiorari in Baker v. Gulf & Western Industries, 961 F. 2d 222 (11th Cir. 1992), cert. denied, 61 U.S.L.W. 3477 (1993).

Like the Sixth Circuit's decision in this case, none of the holdings in the previously noted cases are in conflict with the Ninth Circuit's holding on §113(b) of the 1991 Act in Davis v. San Francisco, 976 F. 2d 1536, 1549-1550 (9th Cir. 1992). (See, Brief of Respondent in Opposition to Petition for Writ of Certiorari at 6, 9, and 11.) The holding in Davis concerned the 1991 Act's

provision for the recovery of expert witness fees. In contrast, petitioners' discussion demonstrates the noted cases address: §101, which expands the scope of 42 U.S.C. (§1981); §102, which creates the potential for compensatory and punitive damages and a jury trial under Title VII (42 U.S.C. §2000e et. seq.); and §105, which creates a new burden of proof for employers defending against disparate impact claims. (Motion at 2-3.) In the end, therefore, each noted case dealt with a specific, and for the most part different, section of the 1991 Act, distinct from the section at issue in Davis.

The only cases that have dealt with the same section of the 1991 Act are this case, Johnson v. Uncle Ben's, Inc., 965 F. 2d 1363 (5th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3356 (September 29, 1992) (No. 92-737) and Baker v. Gulf & Western Industries, 961 F. 2d 222 (11th Cir. 1992), cert. denied, 61 U.S.L.W. 3477 (1993). Those cases are from three different courts of appeals, and the courts in those cases are in agreement that §101 is not retroactive. Thus, the Court's consideration of the issues posed by the other noted cases would not correct Petitioners' erroneous assertion that issues worthy of the Court's review exist in this case.

Finally, none of the other cases present the circumstance unique to this case of claims approved by a court of appeals under §1981 as it existed before the 1991 Act -- claims which are awaiting further processing by the district court on remand. Here, Petitioners have already been granted the right to proceed under

§1981. Combining this case with others, where the applicability of the 1991 Act may be a material issue, would only unnecessarily delay the conclusion of this litigation. Because of that distinction, the Court should consider this case only on its individual merit,[2] and should deny Petitioners' request for a writ of certiorari.

CONCLUSION

Petitioners' motion to have the petition for writ of certiorari considered with other petitions should be denied.

Respectfully submitted,

John T. Landwehr
Counsel of Record
Thomas J. Gibney
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43604
Telephone: (419) 241-6000
Telecopier: (419) 247-1777

Attorneys for Respondent

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[2] If the Court considers this case with the other case involving Petitioners' counsel, Kuhn v. Island Creek Coal Co., 1992 U.S. App. LEXIS 20996 (6th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3383 (November 3, 1992) (No. 92-787), the Court should take care to note counsel's conflicting claims of which case is the "best or "ideal" case to accept for review. (Compare, Rivers Petition at 7, with Kuhn Petition at 19).

CERTIFICATE OF SERVICE

I, JOHN T. LANDWEHR, certify that I am a member of the bar of the Supreme Court of the United States, and I have caused the foregoing MEMORANDUM OF RESPONDENT IN OPPOSITION TO MOTION FOR JOINT CONSIDERATION, to be served by depositing the same, first class postage prepaid, in the United States Mail, this 21st day of January, 1993, addressed to:

Charles Stephen Ralston, Esq.
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013

All parties requires to be served have been served.

John T. Landwehr
Counsel for Respondent